No. 80-420

In The

Supreme Court of the United States

OCTOBER TERM, 1980

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners,

v.

STATE OF OHIO,

Respondent.

On Writ of Certiorari To
The Supreme Court of Ohio

BRIEF FOR PETITIONERS

Herald Price Fahringer, Esq.
Paul J. Cambria, Jr., Esq.
Attorneys for Petitioners
Lipsitz, Green, Fahringer,
Roll, Schuller and James
Barbara Davies Eberl, Esq.
on the Brief
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

QUESTIONS PRESENTED FOR REVIEW

1. In a state criminal prosecution for pandering obscene materials, where the materials are arguably protected by the First Amendment of the United States Constitution, and where the defendant, in raising a defense of discriminatory enforcement of the law, has presented evidence that he has been singled out for prosecution and that the prosecution was based upon the desire to prevent his exercise of constitutional rights, has a *prima facie* case of unconstitutional discriminatory enforcement been presented and does the state then have the burden of rebutting the *prima facie* showing to avoid a finding of discriminatory enforcement?

2. In a state criminal prosecution for pandering obscene materials, where a trial court, after weighing the evidence presented, including the credibility of the witnesses, finds that unconstitutional discriminatory enforcement has been proven, does an appellate court's reversal of that finding because of the appellate court's failure to accept the trial court's determination of credibility of portions of the principal witness' testimony, contrary to a well-established rule of review, deny the defendant equal protection of the laws?

TABLE OF CONTENTS

	Page
Questions Presented for Review	*i*
Table of Authorities	*iv*
Opinions Below	2
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Obscenity Control in Cleveland under Taylor	3
Hustler Magazine	5
Calculated Nonenforcement Against Similar Magazines	7
The Trial Court Decision	9
Ohio Court of Appeals Opinion	10
Ruling of Ohio Supreme Court	11
Summary of Argument	13

ARGUMENT

I — In a criminal prosecution for the distribution of a presumptively protected magazine, where a *prima facie* case of unconstitutional discriminatory prosecution is established, the state has the burden of rebutting that *prima facie* showing. The absence of any evidence by the state to dispel the inference of selective enforcement mandates that the charges be dismissed	14
Curtailment of Exercise of First Amendment Rights	17
Burden of Proof	18

Page

II — Where an Ohio court, after weighing the evidence presented, including the credibility of the witnesses, determines that a case of unconstitutional discriminatory prosecution has been made and dismisses the criminal complaints, an appellate court errs in overruling the trial court's finding where it makes an independent determination of the witnesses' credibility contrary to that of the trial court, in direct defiance of a well-settled rule of review. 25

Conclusion. 30

APPENDIX A

Text of Constitutional Provisions and Statutes Involved. A-1

TABLE OF AUTHORITIES

Cases:	Page
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)....	17
Beach v. Sweeney, 167 Ohio St. 477, 150 N.E.2d 42 (1958).....	29
Brescoll v. Nationwide Mutual Insurance Co., 116 Ohio App. 537, 189 N.E.2d 73, 22 Ohio Op.2d 423 (1961)..	26, 29
Columbus Board of Education v. Penick, 443 U.S. 449 (1979).....	29
Heller v. New York, 413 U.S. 483 (1973).....	18
Landis v. Kelly, 27 Ohio St. 567 (1875).....	25
Marcus v. Search Warrants, 367 U.S. 717 (1961).....	18
Murguia v. Municipal Court for Bakersfield Judicial Dist., 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).....	16, 18
Near v. Minnesota, 283 U.S. 697 (1930).....	17
New York Times Co. v. United States, 403 U.S. 713 (1971).....	17
Oyler v. Boles, 368 U.S. 448 (1962).....	15
Penthouse International Ltd. et al. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980).....	18
People v. Tornatore, 46 Misc.2d 908, 261 N.Y.S.2d 474 (Poughkeepsie City Ct. 1965).....	16
People v. Utica Daw's Drug Co., 16 A.D.2d 12, 225 N.Y.S.2d 128 (4th Dept. 1962).....	17
A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964).....	17
Roaden v. Kentucky, 413 U.S. 496 (1973).....	18

Page

Snowden v. Hughes, 321 U.S. 1 (1944) 15

Thayer v. Shorey, 287 Mass. 76, 191 N.E. 435 (1934) .. 29

Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961) 15

United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974) .. 16

United States v. Cammisano, 546 F.2d 238 (8th Cir. 1976) 16

United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) 17, 18, 19

United States v. Falk, 479 F.2d 616 (7th Cir. 1973) 16, 18, 19, 21, 22, 23

United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976) 16

United States v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969) 16

United States v. Steele, 461 F.2d 1448 (9th Cir. 1972)... 18

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 15

Constitutional Provisions:

First Amendment 2, 17, 21, 22, 23

Fourteenth Amendment..... 2, 15

Statutes:

28 U.S.C. § 1257(3) 2

Ohio Revised Code § 2907.01..... 2

Ohio Revised Code § 2907.32..... 2, 3

Page

Other Sources:

Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 *U. Ill. L.F.* 88 ..... 16, 18

Annot., 95 A.L.R.3d 280 (1979). 16

In The

Supreme Court of the United States

October Term, 1980

No. 80-420

LARRY C. FLYNT
JIMMY R. FLYNT
ALTHEA LEASURE FLYNT,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF FOR PETITIONERS

Petitioners LARRY C. FLYNT, JIMMY R. FLYNT, and ALTHEA LEASURE FLYNT pray that the Court reverse the judgment of the Ohio Supreme Court, entered on July 16, 1980, which affirmed the judgment of the Ohio Court of Appeals, Eighth Appellate District, entered February 8, 1979.

The Ohio Supreme Court judgment affirmed the reinstatement of criminal complaints against petitioners for pandering obscenity, which charges had been dismissed by the Cleveland Municipal Court in its decision of May 17, 1977.

Opinions Below

The opinion of the Ohio Supreme Court, dated July 16, 1980, is reported at 63 Ohio St.2d 132 (1980) and is printed in the Joint Appendix (A-17). The opinion and journal entry of the Ohio Court of Appeals, Eighth Appellate District is unreported and is set forth in the Joint Appendix at A-8. The opinion of the Municipal Court of Cleveland, Ohio is unreported but may be found in the Joint Appendix at A-5.

Jurisdiction

Following a hearing held on February 28, 1977 before the Honorable Salvatore R. Calandra in the Cleveland Municipal Court, Cuyahoga County, Ohio, it was ordered that the charges against petitioners Larry C. Flynt, Jimmy R. Flynt, and Althea Leasure Flynt for pandering obscenity in violation of Ohio Revised Code be dismissed because the charges were the result of intentional discriminatory prosecution.

Respondent State of Ohio appealed to the Ohio Court of Appeals, Eighth Appellate District. On February 8, 1979 that court reversed the order of the trial court and remanded the cause to the Cleveland Municipal Court.

Petitioners appealed to the Ohio Supreme Court which affirmed the judgment on July 16, 1980 (63 Ohio St.2d 132). A petition for a writ of certiorari to the Ohio Supreme Court was seasonably filed within ninety days of the date of the state court judgment. This Court's jurisdiction was invoked under 28 U.S.C. § 1257(3). Certiorari was granted on December 8, 1980.

Constitutional Provisions and Statutes Involved

The text of the First Amendment and section one of the Fourteenth Amendment to the United States Constitution are set forth in Appendix A of this brief, along with Ohio Revised Code §§ 2907.01 and 2907.32.

STATEMENT OF THE CASE

On May 17, 1977, the Cleveland Municipal Court granted defendants-petitioners' motion to dismiss the misdemeanor complaints by which they were prosecuted for pandering obscenity in violation of Section 2907.32 of the Ohio Revised Code (A-5 - A-7). The subject of the prosecution was the widely read, nationally known and distributed (A-85) magazine, *Hustler.** The basis for the trial court's ruling was its agreement with petitioners' well-supported argument that the "complaints represent selective and discriminatory prosecution and therefore violate the equal protection provisions of the Fourteenth Amendment" (A-5).

The dismissal was based upon an evidentiary hearing conducted on February 28, 1977, during which the trial judge had the opportunity to observe and evaluate the testimony of Bruce A. Taylor, the assistant law director who had been in charge of Cleveland's obscenity prosecutions for two years (A-31), and of Steven Nemeckay, a member of the Cleveland Police Department's Bureau of Inspection, Special Investigations Unit, obscenity detail (A-116).

Obscenity Control in Cleveland under Taylor

Assistant Law Director Taylor** testified that since the Mayor's police unit on obscenity was formed in April of 1973, the city had launched between 500 and 550 obscenity prosecutions (A-32). Materials were selected for prosecution for the most part upon instructions given to the police by witness

*Neither the retailers nor the distributors were charged but instead, Columbus-based publisher Larry C. Flynt, and editors Jimmy R. Flynt and Althea Leasure Flynt were arrested.

**During the past four years, Taylor has been directly involved in obscenity prosecutions for Cleveland, first as a law student, then as an assistant prosecutor, and finally as the assistant law director in charge of all obscenity cases (A-31).

Taylor in his capacity as the exclusive prosecutor of obscenity cases (A-34, A-126). His specific directives to the police were that applicable Supreme Court decisions prohibited the sale of "obscenity which is hard-core" (A-34). He "defined to them what [he] thought hard-core meant" (A-34). This definition referred to "actually [sic] instead of simulated acts of sex, and where ejaculation et cetera, is shown . . ." (A-35). Accordingly, enforcement concentrated on "what we call adult bookstores and theaters" where hard-core materials are purchased (A-35).

At Taylor's direction, the police were to seize the "most explicit of the material available" (A-36). Explicit meant "actual photographs of penetration where it is clearly shown and not just in position" (A-36) or bizarre depictions of "bestiality, . . . masochism, bondage and sadomasochism" (A-36), all of which had "sexual conduct clearly shown" (A-37).

Authority to establish prosecutorial guidelines had been delegated to Taylor by the chief prosecutor (A-31, A-38, A-53, A-56), and the police implemented Taylor's instructions (A-36). During Taylor's two years as supervisor of obscenity prosecutions, there had been no actions initiated against paperback books or unillustrated materials (A-37, A-38). Consistent with his well-established guidelines, virtually every prosecution involved works displaying explicit sexual activity (A-45). Moreover, practically every publication* contained more than mere frontal nudity (A-81). In a startling admission, witness Taylor acknowledged "[w]e had never prosecuted a magazine like *Hustler*" (A-81).

---

*The exceptions to the rule of prosecuting only hard core publications were a magazine containing nude photographs of children, which would of course constitute a violation of a different section of the Ohio Code [§2907.31] (A-48), and vague allusion to a newspaper format publication called *Screw* which the witness could not recall showing actual penetration (A-43, A-54).

Hustler Magazine

The proof at the hearing demonstrated that *Hustler** follows the format and basic philosophy of as many as 50 or 75 nationally known men's or adult magazines sold in Cleveland, such as *Playboy*, *Club*, *Penthouse*, *Gallery*, *Genesis*, *Oui*, *Cavalier*, *Swank*, *Stud* and *Dude* (A-83—A-85, A-87, A-106). An inspection of the publication itself will reveal that *Hustler* contains editorials, motion picture reviews, feature articles, contemporary fiction, interviews and special commentaries dealing with various sexual subjects. The magazine publishes pictures of women in the nude with genitals fully exposed, but, as testified to by witness Taylor, there are no pictures of explicit sex acts so as to bring *Hustler* squarely within the precincts of Taylor's well-formed prosecutorial policy (A-62).

Taylor testified at some length concerning the content of the July, 1976 issue of *Hustler* (A-61—A-82) notwithstanding that he had not read the magazine carefully but had just briefly scanned it (A-63). (He acknowledged that the August 1976 issue was similar [A-93].) Taylor conceded that he had told a television interviewer that the prosecution was launched because of a political cartoon which was the subject of complaints to the police about " 'what they're doing to our president' " (A-55, A-59.** Later, Taylor altered this version, denying that petitioners' charges arose out of that cartoon, but was forced to admit that he had publicly indicated the cartoon was the main reason the magazine had been singled out for prosecution (A-60). Moreover, he confessed that a depiction of Uncle Sam with

*The July and August 1976 issues which were the subject of the prosecution were identified before the court during the hearing, and the witness testified as to what he could see in the magazine (A-61—A-78); curiously, however, at the prosecutor's request, they were not marked as exhibits.

**The cartoon consisted of President Ford, Henry Kissinger, and Nelson Rockefeller attempting to do rude things to the Statue of Liberty, obviously without her consent (A-55).

his pants down contributed to the decision to prosecute, but only because of the nudity in the cartoon (A-67). Thus, because of the political cartoon, the magazine was "turned . . . over to the officers in the smut squad. . . [and then to Taylor to see] . . . if they could make a case out of it" (A-55, A-56).

Taylor found the July, 1976 issue of *Hustler* to contain many features, cartoons, pictures and stories which of themselves were not obscene (A-70, A-72, A-74, A-75). For example, he acknowledged that an interview with Althea Leasure, similar to those found in any prominent magazine, "didn't seem to be sex-oriented" (A-63). However, he pointed to "dirty jokes" (A-76), pictures of dolls with sexual organs (A-77, A-78), a cartoon showing simulated sexual intercourse (A-78, A-79), and exhibitions of genitals (A-79) as supporting his determination that the magazine, taken as a whole, was obscene (A-79). Nevertheless, Taylor candidly admitted that he had never prosecuted magazines devoted solely to frontal nudity (A-80, A-82), exclusively to stories dealing with sex (A-82), only to cartoons (A-82), or solely containing reviews of X-rated materials (A-82, A-83).

When asked to compare *Hustler* with similar national men's magazines widely sold throughout the area, the prosecutor agreed that the other publications, like *Hustler*, contained pictures of nude women with exposed genitals (A-87, A-88), stories with sexual content (A-88), and advice columns answering readers' questions about sexual problems (A-88). He concurred that *Hustler's* format was akin to those of the other magazines (A-88). However, Taylor indicated that some of the other magazines, i.e. *Club* and *Gallery*, depicted scenes of simulated sexual intercourse, which representations were not found in *Hustler* (A-88), and thus, were more sexually explicit.

The testimony further established that articles on the various sexual aberrations mentioned in *Hustler* also appeared in these other magazines (A-89). Similarly, excluding *Playboy*, Taylor

acknowledged that the other magazines were "comparable to *Hustler,*" and that the pictures were "pretty much the same" (A-88, A-89); that, in fact, at least Club's pictures were "stronger" (A-90).

Although he was not qualified as an expert on the subject of English literature, the witness nevertheless offered his untrained view that the stories in *Penthouse* "seem to be a little better written as far as literary words" (A-90), but insofar as content, the *Penthouse* stories "still describe the same thing . . ." (A-90).

Essentially, the prosecutor's differentiation between *Hustler* and the other nationally distributed men's magazines merely rested on his opinion that *Hustler's* jokes were more "shocking" (A-89), its stories "less well written" (A-90) and of "lower mentality" (A-90), and its cartoons more sexually oriented (A-92).

Calculated Nonenforcement Against Similar Magazines

The singular most important revelation of the February 28, 1977 hearing was that Assistant Law Director Taylor had initiated criminal (A-97) and civil (A-95) proceedings against only *Hustler* magazine but none of the other men's magazines widely available in the Cleveland community.* The record established that the police and the prosecutor's office knew of

*Prior to the hearing, the City of Cleveland had not only commenced criminal prosecution against petitioners, it also had brought a civil injunction suit against *Hustler* in the Cuyahoga County Common Pleas Court (A-95). Taylor's office expressly threatened retailers that if *Hustler* were determined to be obscene, its sale would be a violation of law (A-137). A letter was sent by the prosecutor's office to the George Klein News Co., distributor of *Hustler*, advising of the city's intention to prosecute the dissemination of the magazine (A-94, A-95). No mention was made of any threatened action regarding any other magazine (A-95), and as well no steps to obtain an injunction were taken as to any of the other "comparable" publications (A-95).

and actually examined other magazines (A-96), but did not open any files on them (A-96, A-97), or take any steps whatsoever toward prosecution of them (A-96). There were no seizures of other magazines (A-97), and Officer Nemeckay, who also testified, conceded that he had not even started steps preliminary to such action (A-137, A-138). The Assistant Law Director tried to dispel the blatant appearance of selective enforcement against *Hustler* by weakly claiming that the decision on possible future prosecutions of similar national magazines was yet to be made (A-86), and that it may not be his to make. This last minute explanation flew directly in the face of his former assertion that he was delegated and possessed the authority to determine the publications his office prosecuted (A-38), and that all the officers ultimately came to him and he alone approved and guided each prosecution. Indeed, the record is replete with testimony supporting the inescapable conclusion that it was Bruce Taylor who chose to prosecute petitioners for "pandering" *Hustler* (A-31, A-38, A-53, A-56), and at no time did he claim any sort of participation or consultation regarding his decisions in this area from any other authorities.

The prosecutor attempted to justify the obvious difference in treatment by his office of *Hustler* and comparable men's magazines, none of whose editors and publishers had been arrested, solely on the basis of the location of *Hustler's* corporate headquarters in Columbus, Ohio (A-109, A-110). This explanation, however, was thoroughly at odds with the admitted uniform practice of Taylor's office: to prosecute the *retailers* and *distributors* as opposed to the editors or publishers. This established practice was followed in the more than 500 previously prosecuted obscenity cases, irrespective of the fact that the magazines were published out-of-state, since in all prior cases the publication was admittedly the gravamen of the complaint (A-33, A-110, A-111). Yet, in the instant prosecution Taylor ignored all of the other individuals who were selling all

of the other comparable magazines, and concentrated solely on *Hustler* and its employees.

The Assistant Law Director confessed that "public reaction" and "what the community feels about what we're doing" were factors in his decision of whether to prosecute *Hustler* or other magazines (A-102—A-104). However, he feebly attempted to explain away these remarks by stating that publicity causes the cases to be more "drawn out" (A-103). Since this "explanation" offered little insight into the reasons a specific magazine was chosen for prosecution, the prosecutor was then asked:

> "Q. So in other words, if you're going to make this future determination regarding these other magazines, you're going to be looking at other things other than just what the content of the magazine is; you're going to be looking to what is going on around you, and how people react to the prosecution?" (A-104).

Returning to his original statement on public sentiment, he acknowledged:

> "A. Certainly, that is a thing that has already taken place. It's already been considered" (A-104).

The Trial Court Decision

The trial court judge, after weighing all of the evidence, hearing and observing the witnesses, and assessing their credibility, found that:

(1) Cleveland's obscenity prosecutions were based on guidelines limited to hard-core pornography (A-6);

(2) The magazines prosecuted to date were sold only in "adult" book stores (A-6);

(3) Other magazines generally available throughout the community contained some hard-core material and yet were not prosecuted (A-6);

(4) *Hustler* did not contain hard-core material (A-6);

(5) Other magazines similar to *Hustler* were actually available at the same locations but were not being prosecuted (A-6).

The trial court did not attach significance to the fact that this was the "first prosecution of this type of magazine or of this type of defendants" (A-6). However, the court specifically noted on the date of its May 17, 1977 decision that "no other similar prosecution had been initiated either prior or subsequent to the charges filed in this case in July of 1976" (A-6). Indeed, as if foretelling the case's ultimate destiny to this Court, the trial judge recognized that:

> "If there are, as the evidence clearly indicates, other magazines, similar in content to the magazine in question, then to select and prosecute this magazine only, presents a serious constitutional question" (A-6).

The charges were dismissed on the trial judge's amply supported finding that the proof clearly established petitioners' allegations of discriminatory prosecution.

Ohio Court of Appeals Opinion

On February 8, 1979, the Court of Appeals of Ohio, Eighth District, sitting in Cleveland, reversed the trial court's order granting petitioners' motion to dismiss the criminal charges and remanded the case to the Municipal Court (A-8—A-16). The court of appeals determined, based upon its own selective reading of the record, that petitioners had not met their burden of proving unlawful discriminatory prosecution. In ignoring the prosecutor's own admission that petitioners' publication had been singled out because of an immodest political cartoon about which complaints had been received, the court instead chose to believe the Assistant Law Director's excuse for salvaging the charges that the prosecution was a test case. In fact, in attaching such significance to this unsupported remark, the court's

decision became an enigma in view of its later statement that "[i]t is clear that the prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, or an attempt to make an example, where the evidence clearly demonstrates to the contrary that a discriminatory intent is present" (A-13).

Moreover, Taylor admitted that all phases of obscenity prosecutions were "exclusively, in [his] jurisdiction for the past two years" (A-31), that the Chief Prosecutor delegated the decisions on whether to prosecute to his discretion (A-38), that Taylor had personally decided to prosecute *Hustler* (A-56, A-102), that the police are guided by his interpretations of the law (A-34, A-53, A-118), and that the police rode "on [his] determination and judgment" (A-35). Nevertheless, the Ohio Court of Appeals held that petitioners should have "presented testimony of an individual or individuals responsible for deciding the intended course of prosecutions of magazines of the same format [as *Hustler*]" (A-14), apparently because of Taylor's one ambiguous and contradictory claim that he could not make the decision on whether to prosecute other similar magazines (A-86). As a result and even though Taylor never otherwise even hinted that he had other than a free rein regarding all aspects of such prosecutions, the Court of Appeals found that petitioners failed to present plenary proof that other magazine publishers would not be prosecuted, and thus had not met their burden of proof rather than shifting the burden to the prosecution to rebut the petitioners' case.

Ruling of Ohio Supreme Court

Petitioners appealed to the Ohio Supreme Court, which on July 16, 1980, over the vigorous dissent of Hon. Paul W. Brown, rejected petitioners' argument that after having presented a *prima facie* case of discriminatory prosecution, the burden should have shifted to the prosecution to rebut that

showing (A-17—A-23). The Ohio Supreme Court accepted the prosecutor's unsupported claim that the *Hustler* prosecution was a test case (A-21, A-22). In ignoring Taylor's testimony that he had sole discretion in what obscenity cases he prosecuted (A-22), the court wrote:

> "In order to sustain their burden, the defendants [petitioners] needed to present testimony from those individuals responsible for deciding the intended course of future prosecutions" (A-23).

In a sturdy and well-reasoned dissent, Justice Brown found that "the defendants [petitioners] sustained [their] burden [of demonstrating intentional discrimination] and that the Court of Appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact . . ." (A-23). For example, he noted that:

> "Although Taylor justified this as a test case, there was substantial evidence indicating the contrary. . . . When asked whether he would then pursue other magazines of this type, Taylor testified that the decision was subject to approval from his superiors — this, despite the fact that by his own admission, Taylor possessed the exclusive delegated authority to select which cases to prosecute and he alone had made the decision to pursue Hustler. Furthermore, the evidence strongly indicated that this prosecution was initiated, not to clarify the status of obscenity laws, but rather in response to public reaction to political cartoons" (A-24).

Based upon this complete reading of the record and not the "selected" reading adopted by the majority to support the prosecutor's claimed "test case" camouflage, Justice Brown declared:

> "In light of the trial court's express rejection of the test case rationale, the majority, by selectively adopting testimony supportive of finding this prosecution to be a test case and rejecting evidence to the contrary, im-

> properly impinged on the trial court's prerogative as trier of fact to weigh the evidence and evaluate the credibility of the witnesses. A prosecutor should not be allowed to merely raise the claim that a particular prosecution is a test case, where the evidence clearly demonstrates that to the contrary a discriminatory intent is present" (A-24, A-25).

Justice Brown found proper the trial court's inference of discriminatory intent based upon Taylor's testimony that petitioners were prosecuted because of unfavorable public reaction to *Hustler* (A-25, A-26). He also quite properly noted that "[t]here are also indications that the prosecution was brought to chill the defendants' First Amendment rights" (A-26).

Petitioners' writ of certiorari to the Ohio Supreme Court was granted on December 8, 1980.

Summary of Argument

Petitioners established that the main reason prosecution was commenced against their magazine, which contained presumptively protected material, was public disagreement with a politically controversial cartoon. They also proved that the individual customarily and admittedly vested with exclusive authority to conduct obscenity prosecutions veered from his own established and practiced guidelines to initiate this prosecution based upon such adverse public reaction. Also substantiated was the fact that this prosecutor failed to institute any action whatsoever against known publications of a similar nature. Thus, a *prima facie* case of discriminatory enforcement was demonstrated.

This showing of a *prima facie* case required the prosecutor to come forward with evidence which was solely within his control, rebutting petitioners' proof of intentional selective enforcement. Since the prosecution adduced no rebuttal evidence, the

criminal charge was properly dismissed in accordance with the Fourteenth Amendment's equal protection clause.

Moreover, it was error for an appellate court to disregard specific findings of fact in direct defiance of established Ohio law. In so doing, the Ohio Supreme Court impermissibly shifted the burden of proof to petitioners in contravention of the due process clause.

ARGUMENT

I

In a criminal prosecution for the distribution of a presumptively protected magazine, where a *prima facie* case of unconstitutional discriminatory prosecution is established, the state has the burden of rebutting that *prima facie* showing. The absence of any evidence by the state to dispel the inference of selective enforcement mandates that the charges be dismissed.

This case presents the Court with its first definitive opportunity to hold that a state's obscenity prosecution of a presumptively protected national adult magazine, while purposefully exempting similar publications from criminal charges, is unconstitutionally discriminatory. The record made of the examination of the Cleveland Assistant Law Director, who had exclusive delegated authority as to obscenity prosecutions, reveals that the act of choosing to prosecute *Hustler* Magazine was the product of unlawfully discriminatory motivations admittedly spawned by "official" and public disapproval of a political cartoon brought to the attention of the Cleveland Police Department. The seeds of a major constitutional controversy were imbedded in the February 28, 1977 hearing and at that very moment, the case was destined to reach this Court. Taylor's testimony confirms that the prosecutor's office

responded to community complaints about the political content of *Hustler* and that he impermissibly made citizen reaction the basis of his prosecution.

As shown by the prosecutor's wavering testimony on the reasons for instituting the criminal suit, the prosecution of *Hustler* was not a "test" case. Respondent's action amounted to purposeful and thus illegal discriminatory prosecution. Petitioners established a *prima facie* showing of patent enforcement differential embarked upon in the absence of a valid explanation by the state and which prompted the trial court to properly dismiss the charges. Although the prior warnings of our federal courts to state prosecutors were thought to be more than adequate, apparently further instructions are needed.

Any constitutional evaluation of this issue must be made against the backdrop of the Fourteenth Amendment and those decisions by this Court that have condemned discriminatory enforcement of criminal laws. *Oyler v. Boles*, 368 U.S. 448 (1962); *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Few words sound so familiar as those from the imperishable *Yick Wo* decision:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution" (*Id.* at 373).

It is recognized, however, that in order for selective enforcement of the law to be construed as an unconstitutional discrimination, the discrimination must be "intentional or purposeful". *Snowden v. Hughes*, 321 U.S. 1 (1944). It is also clear that although the discrimination must be shown to be "purposeful", malice, in the sense of personal ill-will toward the

victims of discrimination, need not be demonstrated. *See* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 *U. Ill. L.F.* 88, 90-96.

Discriminatory selection of persons for prosecution has been equated with prosecution "based upon such impermissible considerations as race, religion, or the desire to prevent [their] exercise of constitutional rights." *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). In those cases in which the defendant alleged discriminatory application of criminal laws against him, and in which the courts have specifically addressed the question of whether the alleged basis of selectivity was arbitrary or invidious, the courts have held that where one of the reasons "for the selection of the defendant for prosecution was based upon his exercise of his constitutional rights. . . [such selection] was made on an invidious basis." Annot., 95 A.L.R. 3rd 280, 288, 302 (1979). *See also United States v. Falk*, 479 F.2d 616, 621 (7th Cir. 1973). Accordingly, discriminatory enforcement has been recognized as a defense in the selection of vocal draft counselors for prosecution under selective service laws, *Falk*, *supra;* in the asserted use of tax laws selectively against tax protestors, *United States v. Oaks*, 508 F.2d 1403 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976); in the application of wiretapping statutes to a private detective, *United States v. Robinson*, 311 F.Supp. 1063 (W.D. Mo. 1969); in the enforcement of Blue Laws selectively against non-union shops, *People v. Tornatore*, 46 Misc.2d 908, 261 N.Y.S.2d 474 (Poughkeepsie City Ct. 1965); and in the use of traffic laws to impede unionization, *Murguia v. Municipal Court for Bakersfield Judicial Dist.*, 15 Cal.3d 286, 540 P.2d 44, 124 Cal.Rptr. 204 (1975). *See also United States v. Cammisano*, 546 F.2d 238 (8th Cir. 1976) (discrimination based on national ancestry).

In none of the cases in which the discriminatory enforcement defense was acknowledged and accepted was anything more

required than proof of purposeful discrimination based upon an impermissible consideration.*

Curtailment of Exercise of First Amendment Rights

Federal appellate courts have recognized that discriminatory enforcement of laws in a manner which curtails First Amendment rights is especially pernicious:

> "[T]he Supreme Court has stated, 'It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups whether by the use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system *by selective enforcement of an extremely broad prohibiting statute*' " (*United States v. Crowthers*, 456 F.2d 1074, 1080 [4th Cir. 1972]; emphasis supplied).

Moreover, it is well recognized that when the government selectively chooses to prosecute only those individuals who have exercised their First Amendment rights by, for example, speaking out against government policies or by expressing an unpopular view of society, an informal system of prior restraint is created. There exists a strong presumption against the constitutional validity of such a system. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1930).

In the 1960's prior restraint was found in the massive confiscation of books. *A Quantity of Copies of Books v. Kansas*, 378

---

*Indeed, *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (4th Dept. 1962), accepted by the courts below as persuasive authority for the principle of selective discriminatory enforcement, recognized that purely *arbitrary* enforcement, even though not directed to inhibiting the exercise of constitutional rights, also vitiated prosecutions.

U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961). In the seventies it was seen in the unauthorized seizure of magazines and films. *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973). Today we are faced with the spectacle of intentional discriminatory prosecution, which is fast becoming the chief impediment to a free distribution of the embodiment of protected ideas. *See, e.g., Penthouse International Ltd. et al. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

Burden of Proof

Although it may ultimately rest with the defendant to prove discriminatory enforcement, when purposeful discrimination is shown, even where serious crime is involved, the "People [prosecution] must demonstrate a compelling interest that necessitates the discriminatory enforcement of serious criminal statutes . . .; in other words, the People would be required to show the necessity of singling out for discriminatory treatment only a portion of those who commit serious crimes." *Murguia v. Municipal Court, supra*, 124 Cal.Rptr. 204, 216 (1975).

Even though the *final* burden of persuasion concerning discriminatory enforcement lies with the defense, recent authority holds that a mere threshold showing of discrimination by the defense shifts the burden of going forward to the prosecution. *See, e.g., Falk, supra* at 624; *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972); *United States v. Steele*, 461 F.2d 1448 (9th Cir. 1972). The necessity for this approach was suggested in the Illinois Law Forum article wherein the author states that:

> "Rather than requiring a defendant to prove the prosecutor's knowledge and motivation in order to establish a denial of equal protection, a court should hold that the burden of going forward shifts to the state once the defendant proves that only a few of the knowable

> violators of a law have been prosecuted or that the group prosecuted for violating a law differs from the group not prosecuted in characteristics irrelevant to law enforcement purposes. Only after the state explains what has produced the unequal treatment can the court determine whether the selective enforcement results from the application of unjustifiable or arbitrary enforcement criteria" (*Id.* at 106).

Upon similar reasoning, it has been held that:

> "[W]here it appears that the government is in ready possession of the facts, and the defendants are not, it is not unreasonable to reverse the burden of proof and to require the government to come forward with evidence. . . . It is neither novel nor unfair to require the party in possession of the facts to disclose them. Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1961). We think defendants made a sufficient prima facie showing. . . and that the government, being in possession of the facts. . . should have come forward with evidence of a doubl standard" (*Crowthers, supra*, at 1078).

In accord are the observations of the court in *Falk, supra:*

> "It is, of course, possible that . . . the government changed its policy on nonprosecution. However, in view of its admitted policy not to prosecute prior to that decision we believe that in the particular circumstances of the instant case *it was incumbent upon the government to come forward* with evidence that it had in fact changed its policy generally or otherwise to explain why Falk was being singled out for prosecution in contravention of the government's own procedures" (*Id.* at 621; emphasis supplied).

Adopting these well-reasoned and widely accepted rules to this case, the conclusion is inescapable that petitioners readily established a more than sufficient basis for an inference of unjustifiable discrimination adequate to shift the burden to the prosecution. Indeed, in their motion to dismiss the charges of

pandering obscenity, petitioners alleged grounds supporting their claim that the Assistant Law Director had illegally singled out *Hustler* for prosecution while exempting other comparable national men's magazines. Based upon these well-founded allegations of denial of equal protection, the Cleveland Municipal Court granted petitioners an opportunity to examine the sole official charged with the responsibility of initiating obscenity prosecutions for the City of Cleveland. Despite the prosecutor's attempts to qualify his statements and retract his earlier public remarks, the following conclusions can be drawn from the hearing transcript:

(1) The Assistant Law Director possessed and consistently exercised the exclusive authority to determine whether or not to commence all obscenity prosecutions;

(2) At the time of the arrest, the publisher and editors of *Hustler* were the *only* targets of the prosecutor's obscenity enforcement program;

(3) No other national men's magazines were the subjects of any such charges, and none of these magazines to date had even reached the most preliminary stages of investigation;*

(4) *Hustler's* publisher and editors were arrested, even though the prosecutor's office's policy in the past had been to charge solely the local retailers and distributors;

(5) The prosecutor had received complaints from the community regarding a constitutionally protected cartoon found in one issue of the magazine and began his quest for charges from there;

(6) The Assistant Law Director had publicly stated that *Hustler's* publishers and editors had been chosen for

*In fact, although Taylor attempted to claim that the others were under "investigation" for prosecution, continued probing forced him to admit that the sum total of that "investigation" consisted of awareness of the existence of these other magazines but no formal steps were taken to even open an investigative file on them (A-96, A-97).

prosecution as the result of the local citizens' disapproval of the cartoon.

Furthermore, the testimony revealed that the sexual content of *Hustler* is no more explicit than that of the other magazines of its genre, milder than at least one of the others and the issues upon which the charges were brought contained articles and features which were not even sexually oriented (A-63, A-70, A-72, A-74, A-75, A-87—A-89, A-90). *Hustler* emerges as a magazine that takes an irreverent attitude toward institutions of government, including national political figures (A-55), the Statue of Liberty (A-55), and a prosecutor (A-67). The prosecution was admittedly commenced by witness Taylor (A-56, A-102) because of an irreverent political cartoon (A-54, A-59, A-60) and witness Taylor testified that "publicity" and "public reaction" played a part in the process of selection (A-102—A-104).

The burden upon the prosecutor in the present case should have been no less than that upon the United States Attorney in *Falk, supra,** in view of Taylor's actions in prosecuting only the publisher and editors of *Hustler* while ignoring magazines of the same tenor. When dealing in the delicate First Amendment

---

*After reviewing the evidence adduced by *Falk*, the Seventh Circuit concluded:

> "The unrebutted evidence before the court, including the admission of the Assistant United States Attorney and the two published statements by the Selective Service officials which contradict the propriety of the action taken in this case, made out at least a *prima facie* case of improper discrimination in enforcing the law. . . . In accordance with our holding that a *prima facie* case has already been presented, and in agreement with United States v. Crowthers, *supra*, however, the burden of going forward with proof of nondiscrimination will then rest on the government. Particularly with regard to the seemingly inherent discrimination against Falk in prosecuting him for insisting on his claim as a conscientious objector, *we think the government will be required to present compelling evidence to the contrary if its burden is to be met*" (479 F.2d at 623, 624; emphasis supplied).

area, an elected prosecutor — or an assistant who receives his delegation of authority from one holding elective office — is tempted to take the popular approach to questions of community concern. Yet, as noted by the trial judge in this case (A-104, A-105), the prosecutor does not take into account citizen reaction every time he initiates criminal charges, especially when that reaction is composed of displeasure with the contents or method of presumptively protected speech.

Thus, despite the witness' protestations to the contrary, the trial judge, who was in a position to assess the materials, as well as the credibility of the witnesses, clearly concluded that, at least *prima facie*, the magazine's manner of exercising its First Amendment rights (which apparently irritated some members of the public) and arbitrary considerations of public reaction were at least part bases for prosecuting *Hustler* alone among the magazines of its ilk. Under the circumstances of this case, where First Amendment rights arguably were at stake, and where ample evidence had been presented to demonstrate, *prima facie*, that discriminatory prosecution, initiated by the witnesses, had occurred, the Ohio Court of Appeals and Ohio Supreme Court erred by placing the burden on petitioners to show not only that *Hustler* alone had been prosecuted, but that only *Hustler would be* prosecuted. Rather, the two appellate courts below should have held that it was incumbent upon the prosecution to produce evidence, of which it alone would have knowledge, to rebut the showing that *Hustler* had been discriminatorily singled out for prosecution. In light of the evidence produced by petitioners from which it properly could be inferred that no other magazines of *Hustler's* genre would be prosecuted, the state, in order to avoid a finding of discriminatory prosecution, should have been required to produce rebuttal proof.

In this vein, the words of the Seventh Circuit in *Falk*, *supra*, carry an important message:

> "[W]e wish to note our disapproval of the apparently frequent, and often too easy, practice of simply dismissing

> all allegations of illegal discrimination in the enforcement of criminal laws with a reference to Oyler v. Boles, *supra*, and its statement that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution. *That correct principle does not in many cases answer the question whether selective enforcement in a given case is invidious discrimination which cannot be reconciled with the principles of equal protection.* As Judge Cummings reminded us in Stamler v. Willis, 415 F.2d 1365, 1369-1370 (7th Cir. 1969), cert. denied, Ichord v. Stamler, 399 U.S. 929, 90 S.Ct. 2231, 26 L.Ed.2d 796 (1970), '[t]he judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government' " (*Id.* at 624; emphasis supplied).

We are confident that the Court will not be able to read the revealing record in this case and dismiss the blatant prosecutorial discrimination as mere discretion in the exercise of prosecutorial resources, especially when other vital issues are at stake, and when it quite clearly appears, as Justice Brown noted below, that only a "selective" reading of the transcript can support the Ohio Supreme Court's decision.

Our whole constitutional heritage rebels at the thought of selective enforcement of the criminal laws for it is a handy implement for disguised persecution of nonconformists, making them victims of prejudice and public excitement. Discriminatory prosecution represents an alarming trend in the law today which exemplifies the inequality of the litigating position between the state and even the most resourceful defendant, much less the vast majority of those in less fortunate circumstances. Even more important, however, is that this type of police conduct has an anguishing impact upon the exercise of First Amendment rights, which can all too easily be chilled and if the state's power is not checked, totally curtailed.

All that stands on the frontiers of the First Amendment to protect us from the ruthless discriminatory conduct of law

enforcement officials is a firm rule prohibiting singling out those like petitioners, who have reached the borders of free expression. The decision of the trial court holding that the activities of the prosecutor in arresting petitioners amounted to intentional discrimination based upon a wholly arbitrary classification is a giant step toward stamping out official lawlessness in the delicate area of prosecution of presumptively protected material. We look to this Court to establish a firm rule for the entire country that where a criminal defendant has made out a *prima facie* case of discriminatory prosecution, the burden shifts to the government to come forward with evidence sufficient to rebut the defendant's showing, especially where the government has a monopoly on the facts. In so doing, the Court will do much to insure the safety of the exercise of constitutional rights no matter how controversial or unpopular.

II

Where an Ohio court, after weighing the evidence presented, including the credibility of the witnesses, determines that a case of unconstitutional discriminatory prosecution has been made and dismisses the criminal complaints, an appellate court errs in overruling the trial court's finding where it makes an independent determination of the witnesses' credibility contrary to that of the trial court, in direct defiance of a well-settled rule of review.

The courts below held that petitioners failed to sustain their burden of proof as to the intent to discriminate against *Hustler* because they failed to present evidence that *Hustler* alone would be prosecuted.* In reaching this conclusion, both courts ignored the well-settled principle that a trier-of-fact's determination of the credibility of a witness is entitled to great weight on appellate review. Indeed, this has been the law in the State of Ohio for over 106 years, since the Ohio Supreme Court stated in *Landis v. Kelly*, 27 Ohio St. 567 (1875), that:

---

*In his dissenting opinion, Justice Brown of the Ohio Supreme Court pointedly disagreed:

> "[T]he Court of appeals and this court wrongfully substituted their own version of the facts for that of the trier of fact in the instant cause.
>
> "It is well settled that in reviewing a decision rendered by a trial court without a jury, a Court of Appeals will indulge in every reasonable presumption in favor of findings made by the court below as a basis for its decision. *Beach v. Sweeney* (1958), 167 Ohio St. 477, 150 N.E.2d 42. Any fact necessary to sustain the judgment, including reasonable inferences drawn therefrom, must be presumed to have been found by the trial court if evidence was presented in support of such finding. See *Brescoll v. Nationwide Mut. Ins. Co.* (1961), 116 Ohio App. 537, 543, 189 N.E.2d 173; *Thayer v. Shorey* (1934), 287 Mass. 76, 191 N.E. 435. The appellate courts in the instant cause have deviated from this principle" (A-23, A-24).

> "When, in the trial of an action, a conflict of testimony is manifest, especially when a witness has a deep interest involved in the action, . . .one of the surest tests of truth . . . is derived from a careful scrutiny of the witness while under examination. Where that test is wanting, and the conflict in the testimony is clear and very considerable, the reviewing court must investigate at a great disadvantage, and will always hesitate, where no clear preponderance of evidence appears to favor the claim of the plaintiff in error, to reverse the finding and judgment of the trial court" (*Id.*, at 571, 572).

In the instant case, the only evidence offered by petitioners or the state was the testimony of witnesses Taylor and Nemeckay. The trial court, sitting as trier-of-fact, was able to observe the demeanor of the witnesses while they were questioned and to hear the inflection and emphasis given by them to words and phrases. Because Taylor and Nemeckay were the very persons who were closely involved in prosecuting *Hustler*, they could not be expected to offer direct admissions of discriminatory prosecution. The credibility of their answers was directly at issue. Therefore, the trial court's task was especially demanding and its acceptance and rejection of the witnesses' answers on the basis of credibility should have been entitled to great weight on appellate review.

As the trier-of-fact, the trial judge was obliged to determine whether the motive of the prosecutor was unfairly to single out *Hustler* for a discriminatory purpose; and since there is ample evidence to support that conclusion, the judgment of the trial court should not have been reversed. In *Brescoll v. Nationwide Mutual Insurance Co.*, 116 Ohio App. 537, 189 N.E. 2d 73, 22 Ohio Op.2d 423 (1961), the court declared:

> "[U]pon an appeal taken from a judgment entered by the court upon the evidence. . . without the intervention of a jury, any fact necessary to sustain the judgment will be presumed to have been found by the trial court if the evidence can be found in support of such finding. *Crawford*

> *v. Bach*, 60 Ohio Law Abs. 179; *Gibsonburg Banking Co. v. Wakeman Banking Co.*, 20 C.C. 591, 10 C.D. 754. Or, in other words, where a trial court hears and determines a case without the intervention of a jury and does not make separate conclusions of fact and law, and any evidence is produced to support the conclusions reached under proper rules of law applicable thereto, a reviewing court will presume that the proper rules of law were applied. *Scovanner v. Toelke*, 114 Ohio St. 256" (22 Ohio Op.2d at 426, 427).

However, the court of appeals, solely upon the examination of the "frozen word" without the opportunity to observe the animated witness version firsthand, ignored the trial court's determination of credibility and, instead, chose to accept prosecutor Taylor's anemic explanation that the *Hustler* prosecution was a "test case" (A-13, A-14). The Ohio Supreme Court went even further and, in the critical words of dissenting Justice Brown, "selectively" adopted portions of the witnesses' testimony in an effort to support its own rather peculiar view of the facts.

During his testimony, Taylor had admitted that an immodest political cartoon ignited the *Hustler* prosecution (A-55, A-59, A-60), and that public reaction was an important factor in the prosecution of *Hustler* (A-102—A-104). Further, Officer Nemeckay conceded that not even *preliminary steps* had been taken in the prosecution of other men's magazines (A-137, A-138), and that he had been expressly instructed by Taylor to focus on *Hustler* (A-118). Despite these compelling statements in the record, the "test case" excuse was assigned preeminent importance by both the court of appeals and supreme court (A-13—A-15, A-21, A-22). The Ohio Supreme Court and court of appeals opinions relied upon the most ambiguous statements of Taylor and unreasonably rejected the trial court's well-supported findings that the tenuous "test case" claim was no more than a smoke screen. The trial court specifically wrote that "[t]he Court does not take into consideration that this is the first prose-

cution of this type of magazine or of this type of defendants" (A-6).

In a further effort to justify its finding that the prosecution of *Hustler* was a "test case", the court of appeals glossed over witness Taylor's admission that the prosecution was launched because of a political cartoon. Instead, both appellate courts emphasized that Taylor claimed *Hustler* was chosen because some portions were more "offensive" than those in similar magazines (A-13, A-22). However, the record shows that Taylor admitted that other magazines were "comparable to *Hustler*" and their pictures were "pretty much the same" (A-88, A-89), and in the case of some, the contents more explicit and thus clearly closer to the "guidelines" he had established but deviated from in this case (A-34—A-37, A-45, A-81, A-90). In assessing this testimony, the trial court's determination can be supported by this record upon a finding that what the witness Taylor found "offensive" about *Hustler* was the very political cartoon that he admitted had sparked its prosecution. The determination by the trial court would therefore, by necessity, be based upon a weighing of the witnesses' credibility. On the other hand, the appellate decisions below depend for their vitality, upon a rejection of the trial court's credibility determination, and a substitution of judgment of this score based solely upon the cold record of the testimony of the witness.

The words of Justice Stewart, albeit in a different context, epitomize the common sense of the well-established practice of deferring to the trial court in matters of judgment concerning the facts and credibility:

> "The coldness and impersonality of a printed record, containing the only evidence available to an appellate court in any case, can hardly make the answers any clearer. I doubt neither the diligence nor the perseverence of the judges of the Court of Appeals, or of my Brethren, but I suspect that it is impossible for a reviewing court factually to know a case from a . . .

> printed record as well as the trial judge knew it. In assessing the facts in lawsuits like these, therefore, I think appellate courts should accept even more readily than in most cases the factual findings of the courts of first instance" (*Columbus Board of Education v. Penick*, 443 U.S. 449, 471 [1979] [Stewart, J. & Burger, CJ., concurring]).

In a case where discriminatory enforcement against controversial public figures has been alleged and found to exist, an appellate court's refusal to accept the trial court's well-supported determination of credibility of the testimony of witnesses violates the petitioners' rights to equal protection of the laws, especially where it is accomplished by selectively reading the record. In cases of less constitutional significance, appellate courts customarily defer to the findings of the court of the first instance. Thus, the Court should reverse the judgment of the Ohio Supreme Court and reinstate the holding of the trial court since, being entitled to "every reasonable presumption in favor of [its] findings" and "[a]ny fact necessary to sustain [its] judgment, including reasonable inferences drawn therefrom. . ." (A-23), the judgment is legally valid (*Beach v. Sweeney*, 167 Ohio St. 477, 150 N.E.2d 42 [1958]; *Brescoll v. Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 543, 189 N.E.2d 173 [1961]; *Thayer v. Shorey*, 287 Mass. 76, 191 N.E. 435 [1934]). Therefore, the Court should reverse the judgment below and reinstate the judgment of the trial court.

CONCLUSION

For all the foregoing reasons and authorities, petitioners respectfully urge this Court to reverse the judgment of the Ohio Supreme Court and affirm the judgment of the trial court below.

Respectfully submitted,

Herald Price Fahringer, Esq.
Paul J. Cambria, Jr., Esq.
Attorneys for Petitioners
Lipsitz, Green, Fahringer,
Roll, Schuller & James
Barbara Davies Eberl, Esq.
on the Brief
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

APPENDIX A

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

OHIO REVISED CODE

§2907.01 Definitions.

As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse, fellatio, and cunnilingus between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

APPENDIX A
Text of Constitutional Provisions and Statutes Involved

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to

appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is

to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.